

for the procurement of commercial items or a subcontract for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such subcontracts. Nothing in this section shall be construed to render inapplicable to subcontracts under a contract for the procurement of commercial items any provision of law that is not included on such list.

(2) A provision of law described in subsection (c) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

(3) Nothing in this subsection shall be construed to authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(4) In this subsection, the term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(c) Covered law

A provision of law referred to in subsections (a)(2) and (b) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

- (1) provides for criminal or civil penalties; or
- (2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

(d) Petition

In the event that a provision of law described in subsection (c) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) or (b) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) or (b)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) or (b)(2) of this section within 60 days after the date on which the petition is received.

(Pub. L. 93-400, §34, as added Pub. L. 103-355, title VIII, §8003(a), Oct. 13, 1994, 108 Stat. 3388.)

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective

Date of 1994 Amendment note under section 251 of this title.

Section 8003(b) of Pub. L. 103-355 provided that: “No petition may be filed under section 34(d) of the Office of Federal Procurement Policy Act [41 U.S.C. 430(d)], as added by subsection (a), until after the date occurring 6 months after the date of the enactment of this Act [Oct. 13, 1994].”

§ 431. Commercially available off-the-shelf item acquisitions: lists of inapplicable laws in Federal Acquisition Regulation

(a) Lists of inapplicable provisions of law

(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items.

(2) A provision of law that, pursuant to paragraph (3), is properly included on a list referred to in paragraph (1) may not be construed as being applicable to contracts referred to in paragraph (1). Nothing in this section shall be construed to render inapplicable to such contracts any provision of law that is not included on such list.

(3) A provision of law described in subsection (b) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law. Nothing in this section shall be construed as modifying or superseding, or as being intended to impair or restrict authorities or responsibilities under—

(A) section 644 of title 15; or

(B) bid protest procedures developed under the authority of subchapter V of chapter 35 of title 31; subsections (e) and (f) of section 2305 of title 10; or subsections (h) and (i) of section 253b of this title.

(b) Covered law

Except as provided in subsection (a)(3) of this section, the list referred to in subsection (a)(1) of this section shall include each provision of law that, as determined by the Administrator, imposes on persons who have been awarded contracts by the Federal Government for the procurement of commercially available off-the-shelf items Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services, except the following:

(1) A provision of law that provides for criminal or civil penalties.

(2) A provision of law that specifically refers to this section and provides that, notwithstanding this section, such provision of law shall be applicable to contracts for the procurement of commercially available off-the-shelf items.

(c) “Commercially available off-the-shelf item” defined

(1) As used in this section, the term “commercially available off-the-shelf item” means, except as provided in paragraph (2), an item that—

(A) is a commercial item (as described in section 403(12)(A) of this title);

(B) is sold in substantial quantities in the commercial marketplace; and

(C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) The term “commercially available off-the-shelf item” does not include bulk cargo, as defined in section 40102(4) of title 46, such as agricultural products and petroleum products.

(Pub. L. 93-400, §35, as added Pub. L. 104-106, div. D, title XLII, §4203(a), Feb. 10, 1996, 110 Stat. 654; amended Pub. L. 105-85, div. A, title X, §1073(g)(2)(C), Nov. 18, 1997, 111 Stat. 1906.)

CODIFICATION

In subsec. (c)(2), “section 40102(4) of title 46” substituted for “section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702)” on authority of Pub. L. 109-304, §18(c), Oct. 6, 2006, 120 Stat. 1709, which Act enacted section 40102 of Title 46, Shipping.

Another section 35 of Pub. L. 93-400 was renumbered §38 and is classified to section 434 of this title.

AMENDMENTS

1997—Subsec. (b)(2). Pub. L. 105-85 substituted “commercially available” for “commercial”.

EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 431a. Inflation adjustment of acquisition-related dollar thresholds

(a) Requirement for periodic adjustment

(1) On October 1 of each year that is evenly divisible by five, the Federal Acquisition Regulatory Council shall adjust each acquisition-related dollar threshold provided by law, as described in subsection (c) of this section, to the baseline constant dollar value of that threshold.

(2) For the purposes of paragraph (1), the baseline constant dollar value—

(A) for a dollar threshold in effect on October 1, 2000, that was first specified in a law that took effect on or before such date shall be the October 1, 2000, constant dollar value of that dollar threshold; and

(B) for a dollar threshold specified in a law that takes effect after October 1, 2000, shall be the constant dollar value of that threshold as of the effective date of that dollar threshold pursuant to such law.

(b) Adjustments effective upon publication

The Federal Acquisition Regulatory Council shall publish a notice of the adjusted dollar thresholds under this section in the Federal Register. The adjusted dollar thresholds shall take effect on the date of publication.

(c) Acquisition-related dollar thresholds

Except as provided in subsection (d) of this section, the requirement for adjustment under subsection (a) of this section applies to a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency, as determined by the Federal Acquisition Regulatory Council.

(d) Excluded thresholds

Subsection (a) of this section does not apply to—

(1) dollar thresholds in sections 3141 through 3144, 3146, and 3147 of title 40;

(2) dollar thresholds in the Service Contract Act of 1965 (41 U.S.C. 351, et seq.); or

(3) dollar thresholds established by the United States Trade Representative pursuant to title III of the Trade Agreements Act of 1979 (19 U.S.C. 2511 et seq.).

(e) Calculation of adjustments

An adjustment under this section shall—

(1) be calculated on the basis of changes in the Consumer Price Index for all-urban consumers published monthly by the Department of Labor; and

(2) be rounded—

(A) in the case of a dollar threshold that (as in effect on the day before the adjustment) is less than \$10,000, to the nearest \$500;

(B) in the case of a dollar threshold that (as in effect on the day before the adjustment) is not less than \$10,000, but is less than \$100,000, to the nearest \$5,000;

(C) in the case of a dollar threshold that (as in effect on the day before the adjustment) is not less than \$100,000, but is less than \$1,000,000, to the nearest \$50,000; and

(D) in the case of a dollar threshold that (as in effect on the day before the adjustment) is \$1,000,000 or more, to the nearest \$500,000.

(f) Petition for inclusion of omitted threshold

(1) If a dollar threshold adjustable under this section is not included in a notice of adjustment published under subsection (b) of this section, any person may request adjustment of that dollar threshold by submitting a petition for adjustment to the Administrator for Federal Procurement Policy.

(2) Upon receipt of a petition for adjustment of a dollar threshold under paragraph (1), the Administrator shall—

(A) determine, in writing, whether that dollar threshold is required to be adjusted under this section; and

(B) if so, shall publish in the Federal Register a revised notice of the adjusted dollar thresholds under this section that includes the adjustment of the dollar threshold covered by the petition.

(3) The adjustment of a dollar threshold pursuant to a petition under this subsection shall take effect on the date of the publication of the revised notice adding the adjustment of that dollar threshold under paragraph (2)(B).

(Pub. L. 93-400, §35A, as added Pub. L. 108-375, div. A, title VIII, §807(a)(1), Oct. 28, 2004, 118 Stat. 2010.)

REFERENCES IN TEXT

The Service Contract Act of 1965, referred to in subsec. (d)(2), is Pub. L. 89-286, Oct. 22, 1965, 79 Stat. 1034, as amended, which is classified generally to chapter 6 (§351 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 351 of this title and Tables.

The Trade Agreements Act of 1979, referred to in subsec. (d)(3), is Pub. L. 96-39, July 26, 1979, 93 Stat. 144, as